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IN THE

Supreme Court of the United States

October Term, 1973

No. 73 560

CHINESE MARITIME TRUST, LTD., etc.

Petitioner,

v.

PANAMA CANAL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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CHINESE MARITIME TRUST, LTD., etc.

Petitioner,

v.

PANAMA CANAL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Chinese Maritime Trust, Ltd., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 30, 1973.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, reported at 478 F.2d 1357, is printed in the Appendix hereto (pp. 10a-18a). The opinion of the United States District Court for the Southern District of New York, not yet officially reported but published at 1972 A.M.C. 1478, is also printed in the Appendix (pp. 1a-7a).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 30, 1973. An exten-

sion of time to file this petition until September 27, 1973, was given by Justice Lewis F. Powell, Jr. because of the extended illness of counsel for petitioner. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Is the Panama Canal Company's claim for the expenses of removing a wreck from the Panama Canal subject to an injunction issued in the vessel owner's proceeding brought to limit its liability restricting the prosecution of all claims arising out of the sinking to that proceeding?

2. Can the issue of limitability of a claim for wreck removal properly be decided on motion before a trial on the merits to determine whether the sinking was negligent and whether the vessel owner was privy to or knew of that negligence?

3. Where multiple claims far exceed the limitation fund, may the Panama Canal Company's claim for wreck removal expenses properly be asserted in a separate action?

4. May the Court of Appeals properly condition its affirmance of the District Court's opinion, which held without qualification that the Panama Canal Company's claim for wreck removal expenses need not be filed in petitioner's limitation proceeding, on the Panama Canal Company's agreement to bring its action in the Southern District of New York so that all claims arising out of the SIAN YUNG's sinking may be tried together?

5. May the District Court and the Court of Appeals properly ignore this Court's admonition to favor the reduction of litigation where possible by avoiding multijurisdictional litigation, particularly where, as here, the concursus brought about by petitioner's limitation proceeding would accomplish that end?

Statutes and Regulations Involved

United States Code, Title 46, Section 183:

> "(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F. Limitation of Liability:

> "(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or his property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or his property with respect to any claim subject to limitation in the action."

United States Code, Title 33, Section 409:

> "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as 'sack rafts of timber and logs' in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the

day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title."

United States Code, Title 33, Section 412:

"Any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section 407 of this title to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of the Army, or who shall willfully injure or destroy any work of the United States contemplated in section 408 of this title, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section 409 of this title, shall be deemed guilty of a violation of sections 401, 403, 404, 406, 407, 408, 409, 411 to 416, 418, 502, 549, 686, and 687 of this title, and shall upon conviction be punished as provided in section 411 of this title, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof."

Code of Federal Regulations, Title 35-Panama Canal:

> "§ 117.5 Control of wrecked, injured, or burning vessels.
>
> "When a vessel in Canal Zone waters goes aground, or is wrecked, or is so injured that it is liable to become an obstruction in such waters, or is on fire, the Canal authorities shall have the right to supervise and direct, or to take complete charge of and conduct, all operations which may be necessary to float the vessel, to clear the wreckage, to remove the injured vessel to a safe location, or to extinguish the fire, as the case may be. The Canal authorities may, when necessary, take such action without awaiting the permission of the owner or agent of the vessel, and may require the master of the vessel and all persons under his supervision and control to place the vessel, and all equipment on board, at the disposal of the Canal authorities without cost to the Canal. Unless the Panama Canal Company is subsequently found and determined to be responsible for the accident or the condition necessitating action by the Canal authorities, the necessary expenses incurred by the Canal in carrying out the provisions of this section shall be a proper charge against such vessel, her owners and/or her operators."

Statement of the Case

The SIAN YUNG struck the bank and sank on December 6, 1970, while transiting the Panama Canal under the compulsory control of a Panama Canal Company pilot. The Republic of Vietnam sued the shipowner (petitioner) in the United States District Court for the Southern District of New York, alleging damages of $1,600,000. Petitioner then filed the complaint herein seeking exoneration from or limitation of liabiilty, tendering a stipulation for the value of its interest in the vessel and pending freight, and seeking restraint of the prosecution of claims against it otherwise than in this proceeding, all pursuant to Rule F

of the Supplemental Rules for Certain Admiralty and Maritime Claims.

On January 18, 1971, the District Court (Cannella, D.J.) by order approved petitioner's *ad interim* stipulation for value, directed notice to all claimants to file claims herein by March 2, 1971 or be defaulted, and restrained other proceedings. Claims in amounts greatly exceeding the amount of the limitation fund were filed by the Republic of Vietnam and other cargo claimants.

Respondent, Panama Canal Company, filed no claim but, within the time fixed for filing claims, moved for a unique order declaring that an action by it for wreck removal costs would not be subject to the injunction contained in the restraining order, or alternatively that its time within which to file a claim be extended. The affidavit of Philip A. Berns, of the New York office of the Admiralty and Shipping Section of the Department of Justice, in support of the motion contended that under applicable Canal Zone regulations (35 C.F.R. § 117.5) and "the analogous Wreck Act" (33 U.S.C. § 401, et. seq.), wreck removal expenses incurred by respondent were recoverable from "the vessel, her owners and/or operators." It alleged, citing *In Re Pacific Far East Line, Inc. (Guam Bear)*, 314 F. Supp. 1339, 1349-1350 (N.D. Cal. 1970), that failure to remove "a negligently created obstruction" is clearly within the privity and knowledge of the owner, precluding "any limitation or exoneration as to that claim." Supposedly, "information has indicated" negligence on the part of the shipowner and crew but the source or substance of such information was not given and no claim of personal knowledge on the part of the affiant was made.

The District Court was informed by affidavits that the Board of Local Inspectors of the Canal Zone had found respondent's pilot at fault for maneuvering at excessive speed and that petitioner's crew contended this was the sole cause of the sinking.

Nevertheless, the District Court, (Motley, D.J.), noting that whether removal costs were subject to limitation was expressly reserved by this Court in *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 205 n. 17 (1967), decided as "a question of first impression in this Circuit" (2a) that such costs were "not subject to limitation, as a matter of law." Privity and knowledge was found merely because the wreck was there and did not require a factual determination in the limitation proceeding. (3a) Since the claim was not limitable, an "action for the costs of removal of the s.s. *Sian Yung* from the Panama Canal should not be subject to the injunction in the restraining order in this action." (7a)

The District Court stated:

> "We are not granting judgment for the Canal Company on its claim; we merely hold that if they do recover, that recovery is not limitable. If negligence is in fact an element of the Canal Company's case and is not proved, the owners are free to defend and prevail on that ground." (5a)

The District Court thus necessarily implied that an innocent vessel owner may no longer abandon a sunken vessel and thereby avoid *in personam* liability.

Neither respondent's motion nor the order granting it specified whether the proposed claim for removal expenses was to be asserted against the owner *in personam*, against the vessel *in rem*, or both. The order's unqualified reference to "an action for the costs of removal" (9a) would therefore permit the separate prosecution of such a claim both *in personam* and *in rem*.

The Court of Appeals for the Second Circuit affirmed "substantially for the reasons stated in Judge Motley's opinion" (12a), subject to a condition discussed below. It relied heavily on *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967), saying:

> "In *Wyandotte* * * *, the Supreme Court, holding that where a ship was negligently sunk in

> navigable waters and thereafter abandoned, the Government could recover wreck removal costs from the shipowner, indicated that the recovery would not be subject to limitation under the Limitation Act, since the owner would have had 'privity or knowledge' within 46 U.S.C. § 183(a). * * *." (13a)

The Court of Appeals did not consider the fact that the premise of the *Wyandotte* decision was not merely that the ship "was negligently sunk" but that it was sunk through the personal negligence of the owner. The issue in *Wyandotte* was the legal sufficiency of the government's complaints which alleged negligence on the part of the owners in equipping and manning the vessels (38 U.S. 194-6). *Wyandotte,* therefore, did not reach the question of the *in personam* liability of a non-negligent owner whose vessel has been sunk by the negligence of others.

The Court of Appeals, although affirming that respondent's claim was not subject to the limitation injunction, conditioned its affirmance on a singular requirement "that all parties consent to litigation in the United States District Court for the Southern District of New York of all claims arising out of the sinking of the s.s *Sian Yung.*" (11a, 18a) The condition was imposed in recognition of the fact that "if the Canal Co. pursued its claim for expenses of wreckage removal in a separate action in the Canal Zone, as it originally intended, the owner and perhaps some of the cargo claimants would be forced to engage in duplicative litigation of identical issues in these two widely separated districts." (17a) By imposing this condition, the Court sought to "permit litigation of all claims before one judge under that district's individual calendar system, thus minimizing expense and delay." (18a) All of which amounted to denying the application of the "concursus" theory in law, but requiring it in fact, a confusing and dangerous precedent.

Reasons For Granting The Writ

The case presents important substantive and procedural questions of the interpretation and application of United States statutes and regulations pertaining to shipping not previously ruled upon by this Court.

1. *The decision below, implying that an innocent vessel owner may not abandon a sunken vessel and thereby avoid further personal liability, is in conflict with the prior case law on an important question not previously decided by this Court.*

The argument upon which the decisions below are based is that once the owner knows that the vessel has been sunk, its failure to remove it is necessarily within its privity and knowledge and liability for the costs of removal, therefore, cannot be limited.

The effect of privity and knowledge, however, is not to create liability in the absence of any breach of duty but merely to forfeit the right to limit with respect to an otherwise existing liability. If an innocent owner may properly abandon its vessel and thereby avoid *in personam* liability, its privity and knowledge with respect to the decision to abandon and not remove the wreck is academic. It is therefore necessary to examine the relevant statutes, rules and regulations to determine whether they bar an innocent owner from abandoning the wreck and impose upon him the unavoidable duty of removing it. For the purpose of this analysis that state of facts most favorable to the petitioner must be assumed since the adverse ruling below was made as a pure question of law without resolving any controverted factual issues. Petitioner's allegations that the sinking and all resulting losses were not caused by its fault or that of any persons for whom it is responsible (complaint para. Seventh) must be accepted as the controlling factual hypothesis. The relevant sections of the act of March 3, 1899, 30 Stat. 1151, *et seq.* (33 U.S.C. §403, *et seq.*) must therefore be analyzed in the light of this premise.

The first sentence of section 409 declares it unlawful "to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels." This cannot apply to an owner who, by hypothesis, neither voluntarily nor carelessly caused the sinking.

Section 409 imposes on the owner of a sunken craft the duty to mark it and declares failure to do so unlawful. It then goes on to state "it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418 and 502 of this title." Thus the failure to remove, as opposed to the failure mark, is not specifically declared unlawful but is defined as the equivalent of an abandonment.

Section 412 specifically imposes *in rem* liability on any vessel "used or employed in violating" section 409, i.e., any vessel "voluntarily or carelessly" permitted to be sunk in navigable channels, for any resulting damage.

With respect to vessels sunk in the Panama Canal, the provisions of 33 U.S.C. §§ 403, *et seq.* are supplemented by 35 C.F.R. § 117.5 issued by the Secretary of the Army pursuant to powers delegated by the President under the authority of the Canal Zone Co., 76 A Stat. 1331, 3 U.S.C. § 301. This regulation was described by counsel for respondent as "consistent with the Rivers and Harbors Act, 33 U.S.C. § 401, *et seq.*" (Berns Affidavit, p. 3)

Referring to this regulation, the District Court said:

> "Liability for removal costs under § 117.5 arises from the obligation imposed by the regulation itself upon the shipowner to remove the wreck or pay for its removal by the Canal Company." (3a)

The language of the last sentence of the regulation does not support this unqualified statement. It states that the Canal Company's expenses "shall be a proper charge against such vessel, her owners and/or her operators". The use of the disjunctive "and/or" plainly implies that the owners' or operators' obligation to reimburse the Canal Company does not necessarily exist in every case. If the regulation is to be read in a manner consistent with the Wreck Act, the provisions of 33 U.S.C. § 409 recognizing the possibility of abandonment must be taken into account. If, therefore, an innocent owner has the right to abandon the vessel and thereby free himself of personal liability, nothing contained in 35 C.F.R. § 117.5 can properly be held to abrogate that right.

Before this Court's decision in *Wyandotte* v. *U.S.*, 389 U. S. 191 (1967), there was a division of authority as to whether a *negligent* owner might avoid personal liability by abandoning a sunken vessel. *U.S.* v. *Bethlehem Steel Corporation*, 319 F.2d 512 (9 C.A. 1963); *U.S.* v. *Moran Towing & Transportation Co.*, 374 F.2d 656 (4 C.A. 1967); contra: *U.S.* v. *Cargill Inc.*, 367 F.2d 971 (5 C.A. 1966). The question was resolved by this Court in *Wyandotte* holding that at least where personal negligence of the owner is alleged, a complaint to recover wreck removal expenses *in personam* is not legally insufficient. The court emphasized in a footnote, 389 U.S. at page 197, that "questions involving a non-negligent sinking, which is not forbidden by § 15, [33 U.S.C. § 409], are not now before us * * * ".

On the *Wyandotte* record it is also clear that the court did not face the question of a sinking resulting from the negligence, not of the owner, but of some other party.

The *Wyandotte* opinion repeatedly stresses the fact that what was involved was the government's remedy against a negligent party:

> "The government may, in our view, seek an order that a negligent party is responsible for rectifying the wrong done to maritime commerce by a § 15 violation." (204)

> "Indeed, in any case in which the Act provides a right of removal in the United States, the exercise of that right should not relieve negligent parties of the responsibility of removal." (205)

In accordance with this reasoning the Court rejected as "illusory non-statutory law" the argument that a negligent owner might abandon a vessel and thereby avoid all but *in rem* liability. (209)

Thus nothing in *Wyandotte* forecloses the right of an innocent owner to abandon a wrecked vessel and thereby avoid *in personam* liability. Such a right has been recognized repeatedly both before and after *Wyandotte*. In *re Highland Nav Corp.*, 24 F.2d 582 (S.D.N.Y. 1927); *Orrell* v. *Willmington Iron Works Inc.*, 89 F.S.. 418 (E.D. N.C. 1950); *Loud* v. *U.S.*, 286 F. 56 (6 C.A. 1923); *In re Marine Leasing Services, Inc.* 328 F.S. 589 aff'd 471 F.2d 255 (5 C.A. 1973).

The Court of Appeals for the Fifth Circuit in *United States* v. *Cargill Inc.*, 367 F.2d 971 (1966), the decision affirmed by this Court in *Wyandotte*, said:

> "Therefore, we believe the correct reading of the statute allows only an innocent owner to abandon his ship and that a negligent party must raise the vessel or pay for its removal." (978)

In the same decision the court recognized the distinction, ignored by the courts below in the present case, between *in rem* and *in personam* liability for wreck removal costs:

> "The right to recover *in rem* from the vessel so removed flows from ownership of the vessel and does not preclude recovery of reasonable removal costs from a tortfeasor." (367 F.2d at 976)

The reference in 33 U.S.C. § 409 to abandonment as the implied consequence of an owner's failure to remove would have been meaningless if in no circumstances an owner could thereby avoid personal liability. To give the Act meaning it must be inferred that in at least some instances a right of abandonment may exist in favor of an innocent owner.

Whether the right of abandonment extends to the situation of a vessel sunk through the negligence of the master or crew, without the privity or knowledge of the owner, is a question not reached in the present posture of this case. It is true that in *In Re Pacific Far East Line Inc.*, 314 F.S. 1339 (N.D. Cal. 1970) the District Court, after trial of the merits of the limitation proceeding, denied the owner's right to limit as to removal expenses where the wreck had been caused by negligence of the master and crew. The court held in effect that the imputed negligence of the owner's servants placed upon the owner the obligation to remove the wreck. That result need not follow where no negligence of the owner's servants has been established.

2. *The decision below sanctions a departure from the accepted and usual course of judicial proceedings in denying the concursus of a limitation proceeding, before trial of the merits, although there are multiple potential in rem claims greatly exceeding the limitation fund.*

For the purpose of the questions now presented it is significant that the *Pacific Far East* case did not involve an attempt to divorce the claim for removal expenses from the limitation proceeding. In *In Re Midland Enterprises, Inc.*, 296 F.S. 1356 (S.D. Ohio 1968) the court recognized the question whether negligence of master and crew, as opposed to owner, would give rise to removal responsibility and hence personal liability for removal costs but properly ruled that the question should be passed until trial of the merits of the limitation proceeding.

Considerations of substance as well as procedural efficiency dictate that the same approach be adopted in the present case. In view of the compulsory pilotage, it is not clear before trial on the merits that the rule of the *Pacific Far East* case, should it be eventually adopted by this Court, would be applicable to the facts. If it should appear that the sinking resulted solely from the negligence of the compulsory pilot, there would be no basis, as in *Pacific Far East Line*, for imputing the negligence to the owner.

The courts below assumed that the result of respondent's claim for wreck removal expenses would necessarily be all or nothing—no liability or unlimited liability. This ignored the real possibility that the owner, if free of fault, might avoid personal liability notwithstanding the possible *in rem* liability of the vessel under 33 U.S.C. § 412 flowing from the negligence of the compulsory pilot. The case therefore potentially involves the classic situation demanding the *concursus* of a limitation proceeding: multiple claimants and an inadequate fund. *Lake Tankers Corp.* v. *Henn*, 354 U.S. 147, 154.

Recognizing the inconvenience and inefficiency of permitting litigation in widely separated districts arising from the same occurrence, the Court of Appeals conditioned its affirmance upon the agreement of all parties to litigate in the Southern District of New York. It thus attempted to accomplish in a left handed manner the convenience and efficiency which could more readily be achieved by requiring all claims to be adjudicated within the limitation proceeding, a solution which would not have prejudged the question whether, upon the facts as ultimately developed, the claim for removal expenses may be subject to limitation. *Just* v. *Chambers*, 312 U.S. 383, 386.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 CIV. 161

In The Matter

Of the

Complaint of CHINESE MARITIME TRUST, LTD., as Owner of the Steamship *Sian Yung*, for Exoneration from or Limitation of Liability.

The SS. *Sian Yung* sank in the Panama Canal on December 6, 1970 and has remained there ever since. Its owner, Chinese Maritime Trust, Ltd., petitioned this Court on January 12, 1971 for exoneration from or limitation of liability pursuant to 46 U.S.C. §§ 183-185, and 188 and Rule F of the Admiralty Rules. On January 18, 1971 Judge Cannella of this Court restrained the commencement or prosecution of all suits to recover damages for loss resulting from this casualty, and approved the owner's stipulation for value of $16,246.57. The cargo claimant, Republic of Vietnam, has claimed damages of approximately $1,600,000. Judge Cannella's order also required all parties with claims against the owners to file them in the limitation proceeding by March 2, 1971.

The Panama Canal Company, a government-owned corporation, now moves for a declaration that an action for the costs of removal of a wreck obstructing navigable waters of the Panama Canal Zone is not subject to the restraining order. Estimated costs of removal are given as $2,000,000.

Opinion of the District Court

The issue before this court is whether the Canal Company's claim for removal costs is subject to limitation and must therefore be included in the limitation proceeding at this stage, a question of first impression in this Circuit.[1]

The Canal Company's right of action arises under 35 C.F.R. § 117.5, which states:

> *Control of wrecked, injured, or burning vessels.*
>
> When a vessel in Canal Zone waters goes aground, or is wrecked, or is so injured that it is liable to become an obstruction in such waters, or is on fire, the Canal authorities shall have the right to supervise and direct, or to take complete charge of and conduct, all operations which may be necessary to float the vessel, to clear the wreckage, to remove the injured vessel to a safe location, or to extinguish the fire, as the case may be. The Canal authorities may, when necessary, take such action without awaiting the permission of the owner or agent of the vessel, and may require the master of the vessel and all persons under his supervision and control to place the vessel, and all equipment on board, at the disposal of the Canal authorities without cost to the Canal. Unless the Panama Canal Company is subsequently found and determined to be responsible for the accident or the condition necessitating action by the Canal authorities, the necessary expenses incurred by the Canal in carrying out the provisions of this section shall be a proper charge against such vessel, her owners and/or her operators.

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[1] A similiar question—whether removal costs arising under the Rivers and Harbors Act are subject to limitation—was expressly reserved by the Supreme Court in *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 205 n. 17 (1967). See also Comment, *Removal of Obstruction from Navigable Waters*, 48 N.C.L. Rev. 553, 566-72 (1970).

A ship's owner can limit its liability for losses caused by the ship under 46 U.S.C. § 183 only if those losses were incurred "without the privity or knowledge of such owner or owners."[2] Liability for removal costs under § 117.5 arises from the obligation imposed by the regulation itself upon the ship owner to remove the wreck or pay for its removal by the Canal Company. The obligation came within the privity and knowledge of the ship's owner once it became aware that its vessel was obstructing navigation in the Panama Canal. In effect, the court holds that liability for expenses of the Canal Company in removing wrecks pursuant to 35 C.F.R. § 117 is in this case within the privity and knowledge of the owners, and therefore not subject to limitation, as a matter of law.[3]

In so doing, we follow the reasoning of *In Re Pacific Far East Line, Inc.*, 314 F. Supp. 1339, 1349 (N.D. Cal. 1970), which held that an owner could not limit liability for wreck removal expenses imposed by the Rivers and Harbors Act (33 U.S.C. § 409). The Court stated: "The statutory duty to diligently remove the wreck is a mandatory obligation personal to the owner and the failure to so remove is within the privity and knowledge of the owner." *Id.*

There is no indication in the Limitation of Liability Statute, first enacted in 1851, that the costs to the owner

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[2] 46 U.S.C. § 183(a):

"The liability of the owner of any vessel . . . for any loss, damage, or injury by collision, or for any act, matter or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of said owner in such vessel, and her freight then pending."

[3] This case thus differs from *J. Ray McDermott & Co.* v. *Hunt Oil Co.*, 262 F.2d 127 (5th Cir. 1959) and *In the Matter of the Petition of Panoceanic Tankers Corporation*, 67 Civ. 4489 (S.D.N.Y. Jan. 12, 1969), where the question of privity and knowledge was a factual one to be determined in the limitation proceeding.

of removing the wreck of his vessel were to be limited. Nor does the background of the Rivers and Harbors Act, now construed to require shipowners to pay for removal, suggest an answer to this question.

Two policies expressed in recent court rulings, however, point in the direction of our conclusion. First is the renewed vigor which the Supreme Court has read into the Rivers and Harbors Act, one of whose aims is to insure the prompt elimination of obstructions to navigation. *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960); *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967). Second is the disfavor with which expansion of the limitation of liability statute is viewed. *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 437 (1954) (Black, J.); *In re Barracuda Tanker Corporation*, 409 F. 2d (1013) 1015 (2d Cir. 1969). True, if the Canal Company presented its claim in the limitation proceeding it could still recover a full in personum judgment if its claim were later found not to be limitable. *Hartford Accident & Indemnity Co.* v. *Southern Pac. Co.*, 273 U.S. 207 (1924). But to paraphrase the Second Circuit in the *Barracuda Tanker* case, *supra*, it is hard to see how it would foster the purposes of the limitation of liability statutes to delay the Canal Company in prosecuting its action for the costs of removing the SS. *Sian Yung* from the Canal. We find it hard to believe that Congress' intent to promote investment in shipping extended to limiting the costs of removing obstructions to navigation. Courts in England have found that the function of their limitation statutes, which are similar to ours, would not be furthered by limiting costs for wreck removal.[4]

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[4] Included in the sparse history of the limitation of shipowner's liability act of 1851, the forerunner of today's statute, is the following comment of Senator Hamlin, Chairman of the Senate Committee on Commerce, who introduced the bill: "Why not give those who navigate the ocean as many inducements to do so as England has done? . . . That is what this bill seeks to do and no more." Senator Davis said: "It is simply placing our mercantile marine upon the same footing as that of Great Britain." Quoted in Gilmore and Black, *The Law of Admiralty*, 664 n.5 (1957).

See *The Stonedale No. 1*, [1954] 2 All. E.R. 170, *aff'd* [1955] 2 All. E.R. 689.

Defendants contend that we should not at this juncture decide that the Canal Zone's claims are not limitable because negligence by the shipowners must be shown before they are liable for removal costs. This is true under § 15 of the Rivers and Harbors Act, *supra*, where the owners must pay for removal only if the vessel was negligently sunk. *Wyandotte Transportation Co.* v. *United States*, *supra*, at 413 n. 6,420.[5] Section 117.5 of the Canal Zone regulation does not by its terms make recovery contingent on proof that the vessel was negligently sunk, though the Canal Company seems to take the position that negligence is indeed one element of its case (Canal Company brief, at 8).

In the view we take of the case we need not now decide whether 35 C.F.R. 117.5, which has never been judicially interpreted, empowers recovery only where the owners or operators of the ship are negligent or whether the owners are absolutely liable for the costs of removing their vessel. We are not granting judgment for the Canal Company on its claim; we merely hold that if they do recover, that recovery is not limitable. If negligence is in fact an element of the Canal Company's case and is not proved, the owners are free to defend and prevail on that ground.

The same applies to the owner's contention that they are not liable under § 117.5 if the Canal Company is found responsible for the sinking. That section prevents the Canal Company from recovering costs if it is "found and determined to be responsible for the accident." In its affidavit Chinese Maritime Trust states that a Board of Local Inspectors in the Canal Zone, after holding an inquiry, found the Canal Company's pilot and certain of the

[5] Section 15 of the Rivers and Harbors Act speaks of vessels "voluntarily or carelessly" sunk, 33 U.S.C. § 409, and the Government in *Wyandotte* was proceeding under a theory of negligence.

vessel's crew at fault. This finding, we take it, is mentioned to imply that there is some likelihood the Canal Company will ultimately be found responsible for the accident. We are not deciding the merits of that defense now, and it remains available to Chinese Maritime Trust in the Canal Company's separate action.

Chinese Maritime Trust and the cargo claimant, the Republic of Vietnam, urge retention of the Canal Company's claim in the limitation proceeding on the further ground that common questions of fact will be presented in the limitation proceeding and in the action for removal costs. These parties point to possible inconsistencies in determination, as well as the inconvenience they will suffer by participating in proceedings here and in the Canal Zone.[6] Evidently the cargo claimant, Republic of Vietnam, intends to claim against the Canal Company for loss of the cargo, and would prefer to do so in the limitation proceeding.

In favor of their effort to keep the Canal Company's claims at issue here within the limitation proceeding, these parties state that one of the purposes of the limitation statutes is "to bring into one court, at one time, all of the claims arising out of a maritime disaster" (brief of Chinese Maritime Trust, at 8), what Justice Frankfurter in *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 415-16 (1954), called the concourse theory. But "[i]t cannot be said . . . that the concourse theory is today in a flourishing state . . . ," particularly in the Second Circuit. *Gilmore and Black, supra*, at 730. In *Petition of Texas Co.*, 213 F. 2d 479, 482 (2d Cir. 1954), Judge Frank effectively answered the contentions made here. Except when neces-

[6] Just what issues of fact will be common to both proceedings has not been made particularly clear. We assume that the limitation proceeding will touch on the issue of causation only so far as is necessary to determine whether the events causing the sinking were within the owner's privity and knowledge.

sary to protect an insufficient fund ". . . (1) the statutory privilege of limitation is not in the nature of a *forum non conveniens* doctrine, and (2) the statute gives a ship-owner, sued in several suits (even if in divers places) by divers persons, no advantage over other kinds of defendants in the same position." See also, *In re Lake Tankers Corp.*, 232 F. 2d 573 (2d Cir. 1956), *aff'd sub nom., Lake Tankers* v. *Henn,* 354 U.S. 147 (1957). Since we have already found that the Canal Company's claim is not limitable, there is no need to bring its claim into concourse in order to protect the fund now before the court.

For the above reasons, we find that the Panama Canal Company's action for the costs of removal of the SS. *Sian Yung* from the Panama Canal should not be subject to the injunction in the restraining order in this action. Submit order on 5 days notice.

Dated: New York, New York
April 28, 1972

CONSTANCE BAKER MOTLEY
U.S.D.J.

Order of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Civ. 161

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In The Matter

Of the

Complaint of CHINESE MARITIME TRUST, LTD., as Owner of the Steamship Sian Yung, for Exoneration from or Limitation of Liability.

—o—

Panama Canal Company, appearing specially, having moved this Court pursuant to Rule 12 of the Federal Rules of Civil Procedure, for an order declaring that an action for the costs of removal of a wreck obstructing navigable waters of the Panama Canal Zone was not subject to the injunction contained in the restraining order filed in this limitation proceeding and that this Court thereby lacked jurisdiction over the subject matter of that claim and over the Panama Canal Company, and for such other and further relief as to the Court may seem just in the premises, and said motion having come on for a hearing before this Court on the 21st day of April 1971, and Whitney North Seymour, Jr., United States Attorney, and Louis E. Greco, Attorney in Charge, Admiralty and Shipping Section, Department of Justice, having appeared by Philip A. Berns, Esq., in support of said motion for Panama Canal Company, and David C. Wood of Hill, Betts & Nash, attorney for Chinese Maritime Trust, Ltd., and John F. O'Connell of Lord, Day & Lord, attorneys for Republic of Vietnam, having appeared in opposition to said motion, and said motion having

been orally argued and the Court after having read the memoranda and affidavits submitted by the parties, and after due deliberation having filed a Memorandum Opinion of April 28, 1972, granting the motion of Panama Canal Company, and having directed that an order be submitted on five days' notice, it is

Now, on the motion of Whitney North Seymour, Jr., United States Attorney, and Gilbert S. Fleischer, Attorney in Charge, Admiralty and Shipping Section, Department of Justice, attorneys for Panama Canal Company, appearing specially herein,

ORDERED, that the motion of Panama Canal Company be granted in all respects, and, it is

FURTHER ORDERED that an action for the costs of removal of the *Sian Yung* is not subject to the injunction contained in the restraining order filed in this limitation proceeding.

Dated: New York, N. Y.
May 30, 1972

s/ CONSTANCE BAKER MOTLEY
U. S. D. J.

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 747—September Term, 1972

(Argued April 23, 1973 Decided April 30, 1973)

Docket No. 72-1968

In the Matter of the Complaint of

CHINESE MARITIME TRUST, LTD.,

Plaintiff-Appellant,

as Owner of the Steamship SIAN YUNG, for Exoneration from or Limitation of Liability.

REPUBLIC OF VIETNAM and TONG CUOC TIEP TE (General Supply Agency) and UNION TEXTILE CORP., *et al.,*

Cargo Claimants,

PANAMA CANAL COMPANY,

Appellee.

Before:

BREITENSTEIN,* KAUFMAN and MANSFIELD,

Circuit Judges.

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* Of the United States Court of Appeals for the Tenth Circuit, sitting by designation.

Opinion of the Court of Appeals

Appeal from a declaratory order of the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge,* holding that an action by the Panama Canal Company against a shipowner for recovery of expenses incurred to remove the wreckage of the owner's ship which obstructed navigable waters of the Panama Canal Zone is not subject to an injunction issued in a proceeding brought by the owner to limit its liability to its interest in the vessel and her then pending freight pursuant to the Shipowners' Limited Liability Act, 46 U.S.C. §§ 183-185, 188.

Affirmed on condition that the parties consent to litigation in the United States District Court for the Southern District of New York of all claims arising out of the sinking of the ship.

David C. Wood, Esq., New York, N. Y. (Daniel K. Read, Esq., Hill, Betts & Nash, New York, N. Y., of counsel), *for Plaintiff-Appellant.*

Philip A. Berns, Attorney, Admiralty and Shipping Section, Department of Justice (Harlington Wood, Jr., Assistant Attorney General, Whitney North Seymour, Jr., United States Attorney, Southern District of New York, Gilbert S. Fleischer, Attorney in Charge and Warren A. Schneider, Attorney, Admiralty and Shipping Section, New York, Department of Justice, New York, N. Y., of counsel), *for Panama Canal Company.*

Mansfield, *Circuit Judge*:

On December 6, 1970, the S.S. Sian Yung, owned by Chinese Maritime Trust Ltd., sank in the Panama Canal. Since the sunken hull obstructed travel by vessels in this heavily

traversed navigable waterway, removal efforts were commenced by the Panama Canal Company ("Canal Co."), an agency of the United States, after the latter had been advised by the owner that it had abandoned the vessel to its insurance underwriter and that the underwriter did not intend to undertake removal of the vessel. Meanwhile the owner, faced with cargo claims of at least $1.6 million and a claim by the Canal Co. for wreck removal expenses, which were then estimated at $800,000 by the owner and later at $2 million by the Canal Co., commenced a proceeding in the Southern District of New York for limitation of the owner's liability to its interest in the vessel and her then pending freight, pursuant to the Shipowners' Limited Liability Act, 46 U.S.C. §§ 183-185, 188 ("Limitation Act"), and Rule F of the Admiralty Rules. An *ad interim* stipulation of value for the wreck and its pending freight in the amount of $16,246.57 was approved, and the usual monition and restraining order enjoining the commencement of other proceedings in any jurisdiction for damages resulting from the casualty pending a determination in the limitation proceeding were given.

From an order of the district court declaring that the Canal Co.'s claim for wreck removal costs [1] is not subject to limitation or the restraining order, the owner appeals. Subject to the conditions noted below, we affirm, substantially for the reasons stated in Judge Motley's opinion, —— F. Supp. —— (S.D.N.Y. 1972).

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[1] On appeal the Canal Co. urges that expenditures it has made to clean up oil pollution resulting from leakage from the sunken vessel give rise to a claim under relevant portions of the Oil Pollution Act, 33 U.S.C. § 1161(a)(5), (b)(1), (f)(1), (n), which it argues is also not subject to limitation. As that contention was not presented to or considered by the district court, however, it is not properly before us on appeal and we do not pass on its validity.

The Limitation Act was enacted in 1851 as a measure designed to promote investment in American shipping in competition for world trade. It permits a shipowner to limit his liability to the amount of his interest in a ship and her pending freight "for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners. . . ." 46 U.S.C. § 183(a). The Act must be construed, however, in the light of subsequently-enacted legislation and regulations designed to insure that our country's navigable waterways will be kept free of obstructions. Section 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 409, sometimes called the Wreck Removal Act, for instance, provides that

> "whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, . . . it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title."

In *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 205 (1967), the Supreme Court, holding that where a ship was negligently sunk in navigable waters and thereafter abandoned, the Government could recover wreck removal costs from the shipowner, indicated that the recovery would not be subject to limitation under the Limitation Act, since the owner would have had "privity or knowledge" within 46 U.S.C. § 183(a). Speaking for a unanimous court, Justice Fortas noted that " the duty imposed by and the remedy provided in the final clause of § 15

[are] not prescribed only for owners of negligently sunk vessels. Those provisions apply 'whenever a vessel . . . is wrecked and sunk in a navigable channel, *accidentally or otherwise*. . . .' . . . We believe the sections noted by petitioners are intended to protect the United States against liability for removing a sunken vessel if it chooses to do so." (Emphasis supplied). 389 U.S. at 206-07.[2]

Pursuant to the Canal Zone Code, ch. 81, Shipping and Navigation § 1331 (which authorizes the President to prescribe regulations governing the passage and control of vessels through the Panama Canal) and 3 U.S.C. § 301, in turn, President Johnson, by Executive Order 11305, delegated to the Secretary of the Army the power to adopt regulations pertaining to the removal of wrecked vessels from the Canal. Thereafter Title 35, ch. 1, of the Code of Federal Regulations was adopted, which provides in § 117.5

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[2] Recently, moreover, the Supreme Court, in unanimously upholding Florida's Oil Spill Prevent and Pollution Control Act over the proffered objection that the federal Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161, *et seq.*, precluded state regulation, observed:

> "If Florida wants to take the lead in cleaning up oil spillage in her waters, she can use § 12 of the Florida Act and recoup her costs from those who did the damage. Whether the amount of costs she could recover from a wrongdoer are limited to those specified in the Federal Act and whether in turn this new Federal Act removes the pre-existing limitations of liability in the Limitation of Liability Act are questions we need not reach here. Any opinion on them is premature. It is sufficient for this day to hold that there is room for state action in cleaning up the waters of a State and recouping, at least within federal limits so far as vessels are concerned, her costs." *Askew* v. *The American Waterways Operators, Inc.*, 41 U.S.L.W. 4507, 4509 (April 18, 1973).

While the question of the effect of later statutes of Congress on the Limitation Act is thus left open, the policy of allowing recoupment of wreck removal or clean-up expenses incurred by government agencies which have undertaken these tasks is evident.

that when a vessel becomes an obstruction in the Panama Canal the Canal authorities may remove it without awaiting permission of the owner and that unless the Canal Co. is subsequently found responsible for the accident or condition necessitating the removal of the wreck, the necessary expenses incurred by it shall be a proper charge against the owner.[3]

Thus, although responsibility for expenses incurred in removing a wreck from the Panama Canal may ultimately be laid at the door of the negligent party or parties, the immediate obligation to remove the obstruction has been imposed, both by statute and by regulation, upon the shipowner, regardless whether the sinking was caused by his negligence.[4] Confronted with this duty the owner cannot

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[3] "§ 117.5 Control of wrecked, injured, or burning vessels.

"When a vessel in Canal Zone waters goes aground, or is wrecked, or is so injured that it is liable to become obstruction in such waters, or is on fire, the Canal authorities shall have the right to supervise and direct, or to take complete charge of and conduct, all operations which may be necessary to float the vessel, to clear the wreckage, to remove the injured vessel to a safe location, or to extinguish the fire, as the case may be. The Canal authorities may, when necessary, take such action without awaiting the permission of the owner or agent of the vessel, and may require the master of the vessel and all persons under his supervision and control to place the vessel, and all equipment on board, at the disposal of the Canal authorities without cost to the Canal. Unless the Panama Canal Company is subsequently found and determined to be responsible for the accident or the condition necessitating action by the Canal authorities, the necessary expenses incurred by the Canal in carrying out the provisions of this section shall be a proper charge against such vessel, her owners and/or her operators."

[4] It is true that the owner may fail to perform its "duty to commence the immediate removal" of the wreck, 33 U.S.C. § 409, and that its "failure to do so shall be considered as an abandonment of such craft," *id.* However, § 409 does not provide the limits of the owner's responsibility in the matter. Upon abandonment the owner risks exposure to heavy personal liability for wreck removal expenses incurred by the Government *if the latter* proves that the sinking was due to the owner's negligence. See *Wyandotte Transportation Co., supra.*

contend that its failure to remove the vessel and the consequent expense of removal incurred by the Canal Co. is "without [its] privity or knowledge," which is a condition precedent to its invocation of the Limitation Act. To hold otherwise would be to permit the owner, by limiting its liability to the value of the sunken hull, to thwart the strong public policy in favor of creating an incentive on the part of the owner promptly to remove its obstructing ship from navigable waterways.[5] See *Wyandotte Transportation Co.* v. *United States*, 398 U.S. 191 (1967); *In re Pacific Far East Line, Inc.*, 314 F. Supp. 1339, 1349 (N.D. Cal. 1970). We therefore hold that the Canal Co.'s claim is not limitable. Accordingly it may be the subject of an *in personam* suit by the Canal Co. against the shipowner. In so holding we intimate no view as to the merits of the Canal Co.'s claim or the defenses or counterclaims that may be asserted by the owner against it.

In *In re Highland Nav. Corporation*, 24 F.2d 582, 584 (S.D.N.Y. 1927), *affd.*, 29 F.2d 37 (2d Cir. 1928), the district court stated "a shipowner whose vessel has been wrecked and sunk without his fault has a right to abandon it and . . . is not under any obligation . . . to . . . remove it" in view of § 20 of the Rivers and Harbors Act, 33 U.S.C. § 415, which provides that wreck removal expenses incurred by the Government "shall be a charge against such craft and cargo." However, that conclusion has been superseded by the Supreme Court's later statement in *Wyandotte* that the quoted language of § 20 "does not lead to the conclusion that the Government possesses no other right to recover. The phrase merely describes the lien interest of the United States." 389 U.S. 191, 208 n.20.

[5] The shipowner's performance of its duty to remove does not preclude it from seeking recovery of its wreck removal expenses from others to the extent that their negligence caused the wreck, just as the Canal Co. may recover such expenses from the shipowner to the extent that its negligence was a cause of the sinking. See *United States* v. *Moran Towing & Transportation Co.*, 409 F.2d 961 (4th Cir. 1969); *In re Marine Leasing Services, Inc.*, 471 F.2d 255 (5th Cir. 1973).

More troublesome is the owner's contention that, regardless whether the Canal Co.'s claim is not limitable, all claims arising out of the sinking of the Sian Yung should as a matter of equity be prosecuted solely in the pending limitation proceeding rather than become the subject of litigation in other districts, with possible multiple trials of the same issues and duplicative proliferation, waste and inconvenience for all concerned. In support of this position the owner relies principally upon Justice Frankfurter's espousal in *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 415 (1954), of the limitation proceeding as providing the "benefit of a *concursus*" in which all claims would be disposed of in one action.

Although the "*concursus*" theory has not been looked upon with favor by this circuit, at least in cases where the fund may be adequate to satisfy all claims, see *In re Lake Tankers Corp.*, 232 F.2d 573, *reaffirmed en banc*, 235 F.2d 783 (2d Cir. 1956), *aff'd. sub nom. Lake Tankers Corp.* v. *Henn*, 354 U.S. 147 (1957); *Petition of Trinidad Corp.*, 229 F.2d 423, 428 (2d Cir. 1955); *Petition of Texas Co.*, 213 F.2d 479 (2 Cir.), *cert. denied*, 348 U.S. 829 (1954); Gilmore & Black, The Law of Admiralty § 10-41 at 728-32 (1957), it is unquestionably true that if the Canal Co. pursued its claim for expenses of wreckage removal in a separate action in the Canal Zone, as it originally intended, the owner and perhaps some of the cargo claimants would be forced to engage in duplicative litigation of identical issues in these two widely separated districts. When we pointed this out upon oral argument counsel for the Government, recognizing that such a course would be wasteful and inconvenient not only for the parties but for the courts involved, commendably stated that he would recommend that the Canal Co. institute its suit against the owner in

the United States District Court for the Southern District of New York. That course will permit litigation of all claims before one judge under that district's individual calendar system, thus minimizing expense and delay. Accordingly we affirm the decision of the district court on condition that all parties consent to litigation in the United States District Court for the Southern District of New York of all claims arising out of the sinking of the S.S. Sian Yung.